

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|--------------------------|---|--------------|
| ANTHONY PERNA | : | CIVIL ACTION |
| and ANNA PERNA | : | |
| | : | |
| v. | : | |
| | : | |
| NICHOLAS BARBIERI | : | |
| and QUICK & REILLY, INC. | : | No. 97-5943 |

O R D E R - M E M O R A N D U M

AND NOW, this ____ day of June, 1998, the motion of plaintiffs Anthony Perna and Anna Perna, pro se, for reconsideration of the denial of their petition to vacate an arbitration award is denied. Fed.R.Civ.P. 60(b).

The original petition was denied by order of April 16, 1998. In two letters dated April 28 and 30, 1998, plaintiffs submitted additional materials.¹ By letter dated May 4, 1998 plaintiffs requested that the April 16 decision be reconsidered.² On May 8, 1998 defendants Nicholas Barbieri and Quick & Reilly filed a motion in opposition; and on May 11, 1998 plaintiffs filed a "motion in opposition to defendants' motion in opposition."

Plaintiffs' April letters allege that recently discovered evidence reveals further fraud, corruption or undue means of the NASD arbitrators within the meaning of 9 U.S.C. § 10(a)(1). They make two arguments - first, that the arbitrators deliberately and secretly miscalculated

¹ Plaintiffs apparently had not received the order and memorandum denying their petition to vacate the arbitration award when they wrote these letters.

² This letter will be considered a motion for reconsideration under Fed.R.Civ.P. 60(b).

plaintiffs' hearing fees, and second, the arbitrators failed to take an oath before the beginning of the hearing - although concededly sworn in earlier that day. See plaintiffs' letter, April 28, 1998.

The law on a motion to reconsider is as follows: "The purpose for a motion to reconsider is to correct manifest errors of law or fact or to present newly discovered evidence (citation omitted). Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); accord Pavlik v. Lane Limited/Tobacco Exporters Int'l, 135 F.3d 876, 882 n.2 (3d Cir. 1998) (citing Harsco Corp.).

Plaintiffs' letters state that they discovered this evidence "well after" a status conference held on January 7, 1998. Plaintiffs' motion in opposition at 3. However, as was noted in Pavlik, the relevant date is when the evidence became "available," i.e., was discoverable - not when the party actually discovered it. 135 F.3d at 882 n.2. Here, nothing suggests that the evidence was not available before the filing of the original petition to vacate, dated September 2, 1997. Inasmuch as the arbitration award, dated June 30, 1997 listed the fees assessed against and credits given to plaintiffs, and because Anthony Perna was present at the beginning of the hearing in question when the arbitrators were not sworn in, this evidence cannot be considered "newly discovered." As such, it cannot be the basis of a motion for reconsideration.³

Edmund V. Ludwig, J.

³ Moreover, the additional matters asserted are not evidence of "fraud, corruption or undue means." See memorandum, April 16, 1998.